Nos. 15276–77

# In the United States Court of Appeals for the Ninth Circuit

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY, UNION PACIFIC RAILROAD COMPANY, SOUTHERN PACIFIC COMPANY, GREAT NORTHERN RAILWAY COMPANY AND NORTHERN PACIFIC RAILWAY COMPANY, APPELLANTS

*v.*

ALOUETTE PEAT PRODUCTS, LTD., ET AL., APPELLEES

INTERSTATE COMMERCE COMMISSION, APPELLANT

*v.*

ALOUETTE PEAT PRODUCTS, LTD., ET AL., APPELLEES

*APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION*

## PETITION FOR REHEARING

ROBERT W. GINNANE,
*General Counsel,*
C. H. JOHNS,
*Associate General Counsel,*
*Interstate Commerce Commission,*
*Washington 25, D. C.*

JANUARY 25, 1958.

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**PETITION FOR REHEARING**

Pursuant to Rule 23 of the Court, the Interstate Commerce Commission petitions for a rehearing of these appeals for the reason that the court has failed to consider paragraphs (6) and (9) of Section 6 which, we believe, govern the disposition of this matter.

In its opinion, the court upholds the Commission's conclusion that the shippers have not suffered dam-

ages within the purview of the Interstate Commerce Act by the payment of the higher charges. And the court also agrees with the Commission's conclusion that the higher rates made effective on less than 30 days' notice were the ones which the railroads were required to collect and the shippers to pay—that is, such rates were the applicable (legal) rates.

Since the shippers have not suffered any damage within the purview of the Interstate Commerce Act and have paid only the applicable (legal) rate, it would seem that they would be unable to recover any of the charges from the railroads. Such has been the law until now. But the court reasons that since the carriers violated Section 6 (3) by making the 20 percent increases effective on less than 30 days' notice, the increases were not lawfully established, so the shippers can recover the increases as overcharges.[1]

In reaching its decision in this matter, the court relied on paragraph (3) of Section 6 and did not comment on other paragraphs of Section 6 which, in our opinion, compel the conclusion that the long-standing interpretation by the Commission, which handles literally thousands of tariff changes annually,[2]

[1] Even under this view it would seem that the increases would be lawful 30 days after they were filed.

[2] In its 70th (1956) Annual Report to the Congress the Commission reported at pages 57–58:

> During the year, 175,117 publications containing newly established or changed freight, express, pipe-line, or freight-forwarder rates, passenger fares or contract-carrier minimum rates, were received for filing.
>
> * * * * *
>
> Of those tariff and minimum-rate schedules, 2,275 were rejected by the Bureau of Rates, Tariffs, and Informal

is sound. Thus, Section 6, paragraphs (6) and (9) grant authority to the Commission to reject a schedule submitted to it which does not comply with the provisions of Section 6 and provide that a schedule so rejected shall be void and its use unlawful. Section 6 (9) provides specifically that the Commission "*may* reject and refuse to file any schedule which does not provide and give lawful notice of its effective date and any schedule so rejected by the Commission shall be void and its use shall be *unlawful.*" The obvious purpose of this provision is to provide with certainty that if the Commission fails to reject such schedule the rates shown therein become the legal rates and their use lawful. It follows that a suit for over-

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Cases for failure to give notice required by the statute or for nonconformity with regulations, and 8,954 were criticized but were accepted for filing. Filings of powers of attorney, certificates of concurrence, and revocation notices aggregated 15,594. Applications requesting permission to change rates or other tariff provisions on less than statutory notice, or to depart from our publishing rules, numbered 11,613, and 86 were pending November 1, 1955, for a total of 11,699 applications. Of these, 10,225 were approved, 1,389 were denied, and 85 are pending. * * *

* * * * *

A total of 3,398 rate adjustments involving changes in tariffs and schedules of rail, motor, water, freight-forwarder, and express carriers were disposed of by the Board of Suspension, division 2, or the Commission. Substantially all of the adjustments had been protested. Of the total of 3,398, 173 represented increases, 3,111 reductions, 87 both increases and reductions, and 27 neither increases nor reductions. There were 5,672 tariff publications involved in these rate adjustments.

charges cannot be predicated upon a tariff which the Commission fails to reject.[3]

Similarly, Section 6 (6) provides that schedules *shall* be published, filed and posted in such form and manner as the Commission by regulations *shall* prescribe, that the Commission *may* reject a schedule not in accordance with Section 6 or its regulations and that any schedule rejected shall be void and its use *unlawful*. Again it seems plain that unless the Commission rejects the schedule it becomes a lawful one. Surely no one would contend that rates contained in a schedule in the files of the Commission may be the basis of a suit for overcharges because the schedule violates some provision of the Commission's tariff circular containing the prescribed rules. But under the rationale of the court's rule such a schedule is subject to attack on that ground.

The business of rendering transportation for the public today is highly competitive. In many cases changes in schedules are made to reduce rates to a minimum in order to meet other carrier competition. It often happens that after hearing on such a reduced rate which is already in effect, the Commission will find the rate unreasonably low but suggests that an intermediate rate will be reasonable. Compare *National Water Carriers Assn.* v. *United States,* 120 F. Supp. 719. The lower rate in effect is ordered can-

[3] This construction is in harmony with the definition of overcharge in Section 16 (3) because such a tariff is *lawfully* on file with the Commission. Had an attempt been made to collect a charge "in excess of those *applicable*", then, of course, a suit for overcharges would lie. But here, the court has expressly found that the higher charges were "applicable".

celed. The carrier files its new tariff canceling the unlawful rate and publishing the suggested rate. Under the court's rule if only 29 days' notice were given and the Commission failed to detect the error, the shipper two years later could recover as overcharges the addition to its freight bills during that period even though the prior rate had been found to be unlawful because unreasonably low. We do not believe that Section 6 (3) should be construed to permit such a recovery and we submit that Section 6 (9) prevents it.

Beginning as early as 1915, and continuing down to date, in every formal matter presented to it in which the question has arisen, the Commission has consistently interpreted Section 6 of the Act to mean that a rate published in a tariff and accepted for filing becomes, on its effective date, the legal (applicable) rate, even though it violates some provision of the Interstate Commerce Act or some order issued by the Commission, and that no part of the charges collected under this rate may be returned to the shipper except upon a showing (1) that the rate violates some other section of the Act, and (2) that the shipper was damaged through such payment. The rationale for this "strict" rule on tariff applicability, the distinction between the legal rate under Section 6 and the lawful rate under other sections of the Act, and the fact that the Act distinguishes between overcharges (of the legal rate) and damages (for violation of some other section of the Act) are set forth in the following quotations from three decisions of the Supreme Court:

Under the Interstate Commerce Act, the rate of the carrier duly filed is the only lawful charge. Deviation from it is not permitted upon any pretext. Shippers and travelers are charged with notice of it, and they as well as the carrier must abide by it, unless it is found by the Commission to be unreasonable. Ignorance or misquotation of rates is not an excuse for paying or charging either less or more than the rate filed. This rule is undeniably strict and it obviously may work hardship in some cases, but it embodies the policy which has been adopted by Congress in the regulation of interstate commerce in order to prevent unjust discrimination.* * *. [*Louis. & Nash. R. R.* v. *Maxwell,* 237 U. S. at 97]

* * * In order to render rates definite and certain, and to prevent discrimination and other abuses, the statute required the filing and publishing of tariffs specifying the rates adopted by the carrier, and made these the *legal* rates, that is, those which must be charged to all shippers alike. Any deviation from the published rate was declared a criminal offense, and also a civil wrong giving rise to an action for damages by the injured shipper. Although the Act thus created a legal rate, it did not abrogate, but expressly affirmed, the common-law duty to charge no more than a reasonable rate, and left upon the carrier the burden of conforming its charges to that standard. In other words, the legal rate was not made by the statute a lawful rate—it was lawful only if it was reasonable. Under § 6 the shipper was bound to pay the legal rate; but if he could show that it was unreasonable he might recover reparation. [*Ari-*

*zona Grocery* v. *Atchison Ry.,* 284 U. S., at 385]

* * * But the English courts make a clear distinction between overcharge and damages, and the same is true under the Commerce Act. For if the plaintiff here has been required to pay more than the tariff rate it could have recovered the excess, not as damages, but as overcharge, and while one count of the complaint asserted a claim of this nature, the proof did not justify a verdict thereon, for the plaintiff admitted that it had only paid the lawful rates named in the tariff. Of course, no part of such payment of lawful rates can be treated as an overcharge or as an extortion. [*Davis* v. *Portland Seed Co.,* 264 U. S., at 420]

While the terms legal and lawful rates, and damages and overcharges have not always been employed with care, we submit that these Supreme Court decisions do draw a careful line of distinction; overcharges arise where an inapplicable rate or wrong tariff is applied, but as long as the applicable tariff is applied, the remedy of the shipper is by way of damages, if he can establish that the applicable tariff resulted in damage.

In sum, a rate is either applicable (legal) or it is not applicable (legal). If it is applicable (legal) a suit for overcharges or undercharges will not lie. If the applicable (legal) rate is *unlawful,* i. e., unreasonable or discriminatory, a shipper may sue for his *damages.* Failing to recognize this distinction, this court rules that although the shippers have proved no *damage* they may nevertheless recover part of the

charges paid because of the carrier's unlawful act in making effective the increased rates on less than 30 days' notice. The rule is contrary to *Davis* v. *Portland Seed Co.,* 264 U. S. 403, as well as the Commission's long-standing interpretation. To paraphrase the language of the Court in the *International Coal Co. case,* 230 U. S. 184, 200, this Court would allow the shippers to recover what, though called overcharges, would really be a penalty assessed against the carriers for their violation of the law[4] in putting the rates into effect on less than 30 days' notice.

## CONCLUSION

We urge this Court not to overturn 40 years of consistent administrative interpretation of the tariff filing provisions of the Interstate Commerce Act without taking into consideration Sections 6 (6) and (9) of the Act and the distinction between damages

[4] The Court's reliance upon the *Piper* case is misplaced. That case dealt with a tariff provision void on its face. It is similar to the situation where the carrier publishes a rebate in its tariff. The rebate is void—cannot become legally effective—and the carrier may be prosecuted for paying the rebate. *Central R. Co. of N. J.* v. *United States*, 229 Fed. 501. Compare *Chicago & A. Ry. Co.* v. *United States*, 156 Fed. 558, affirmed 212 U. S. 563. Here the Court agrees that the rates became effective but would grant the shippers a refund because 30 days' notice was not given.

and overcharges as expressed by the Supreme Court in the *Portland Seed Co.* case, *supra.*

Respectfully submitted.

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C. H. JOHNS,
*Associate General Counsel,*
*Interstate Commerce Commission,*
*Washington 25, D. C.*

JANUARY 25, 1958.

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CERTIFICATE

I certify that in my judgment this Petition for Rehearing is well founded and is not interposed for delay.

C. H. JOHNS.

U. S. GOVERNMENT PRINTING OFFICE: 1958